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No. 93-1006

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUDIEL HIGAREDA and GERARDO TREVIÑO,
Petitioners

v.

UNITED STATES POSTAL SERVICE
BY AND THROUGH ANTHONY FRANK,
POSTMASTER GENERAL,
Defendants

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII of the Civil Rights Act of 1964, a Claimant must complete the same conditions precedent relevant to asserting substantive claims under the Act.

2. Whether the District Court and the Court of Appeals abused their discretion and erred in dismissing Plaintiffs' Complaint and Motion for Preliminary Injunction.

LIST OF PARTIES

The parties of the proceedings below were the Petitioners, Audiel Higareda and Gerardo Treviño and the Respondent, United States Postal Service.

The parties remain the same before this Court.

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Rule 65 - Federal Rules of Civil Procedure

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUDIEL HIGAREDA
and
GERARDO TREVIÑO,
Petitioners

v.

UNITED STATES POSTAL SERVICE,
BY AND THROUGH ANTHONY FRANK,
POSTMASTER GENERAL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 23, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, page 26, *infra*.

JURISDICTION

Petitioners are postal workers who filed equal opportunity charges against the Postal Service in the United States District Court for the Southern District of Texas. Petitioner Treviño's Complaint was filed December 10, 1990. Petitioners filed an Amended Complaint on April 29, 1991, so as to add Plaintiff Treviño as a party. The Defendants filed Motions to Dismiss on June 25, 1991. The District Court granted Respondents' motion, dismissing Petitioners' case for lack of subject matter jurisdiction. Petitioners took timely appeal for the final judgment

dismissing Petitioners' case by filing a Notice of Appeal. The Fifth Circuit affirmed the judgment of the District Court, thereby dismissing Petitioners' complaint.

The jurisdiction of this Court to review the decision of the appeals court is invoked under 28 U.S.C., Section 1254.

STATUTES INVOLVED

42 USC §2000e-3 (TITLE VII of the Civil Rights Act of 1964 - Section 704a): It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants...because he has opposed any practice made unlawful employment practice by this subchapter, or because he has make a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

FEDERAL RULES OF CIVIL PROCEDURE 65(a): Injunctions

STATEMENT OF CASE

Petitioners, postal workers, filed various EEOC charges against the Postal Service. After filing substantive charges, alleging national origin discrimination (Hispanic), the Petitioners contend that the Postal Service retaliated against them. In response to the alleged retaliation, the workers filed additional charges based on retaliation with the EEOC. Petitioners contend that the pattern of retaliation continued, despite the pending administrative charges.

Since the EEOC lacks administrative enforcement authority, without waiting for the EEOC to complete its investigation and the required conditions precedent which would have enabled Petitioners to assert the substantive claims, Petitioners filed a Complaint in the District Court asking the Court to enjoin the alleged retaliation. No hearing was held on Petitioners' Motion

for Preliminary Injunction.

Petitioners did not assert substantive claims in the Complaint because the Title VII conditions precedent, at the time, had not been completed. Petitioners sought injunctive relief to enjoin employer's conduct alleged to be in violation of Title VII's prohibition against retaliation both in their Complaints and by Motion. In short, Petitioners sought to preserve the *status quo* by enjoining the alleged retaliation, while the EEOC completed its administrative process.

On June 25, 1991, the Respondent filed a Motion to Dismiss. Respondents alleged Petitioners could not seek any relief under Title VII, including injunction against retaliation, because Petitioners had failed to state a claim. Defendant alleged Petitioners could not sustain a claim because the conditions precedent to a Title VII substantive claim had not been

completed. The District Court for the Southern District of Texas agreed and granted Respondents motion, dismissing the case for lack of subject matter jurisdiction. Petitioners took timely appeal for the final judgment dismissing Petitioners' Complaint by filing a Notice of Appeal. On appeal, Petitioners contend that the District Court had subject matter jurisdiction under Title VII to enjoin retaliation even if all conditions precedent had not been completed. Petitioners also contend that, since the application time period precedent had been completed at the time the Court dismissed the case, leave to amend and not dismissal would have been appropriate action by the District Court. The Fifth Circuit Court of Appeals affirmed the District Court's dismissal of Petitioners' Complaint.

Petitioners now file this "Petition for Writ of Certiorari".

REASONS FOR GRANTING THE WRIT

I.

The District Court and the Court of Appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII of the Civil Rights Act of 1964, a Claimant must complete the same conditions precedent relevant to asserting substantive claims under the Act.

II.

The District Court and the Court of Appeals abused their discretion and erred in dismissing Plaintiffs' Complaint and Motion for Preliminary Injunction.

On November 17, 1992, the District Court granted the Respondent's Motion to Dismiss. Petitioners' contend a claimant who has established a *prima facie* case of retaliatory discharge is generally entitled to injunctive relief unless it can be shown that there is no reasonable expectation that discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated.

Denial of injunctive relief is generally subject to reversal only for abuse of discretion of the trial court. However, if the movant makes out a *prima facie* Title VII violation, injunctive relief must be granted unless there is no reasonable expectation that the discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated.

Title VII's prohibition on retaliation is a section that is separate from the Act's general provisions regarding the other protected bases. The retaliation provision has two distinct provisions. One relates to protection in the context of "opposition" to an unlawful practice. The other provision relates to protection in context of "participation" in a Commission investigation.

> (a) It shall be an unlawful employment practice for an employer to discriminate against

> any of his employees or applicants...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e-3 (emphasis added).

Regarding the conditions precedent under 42 U.S.C., Section 2000e-3, Plaintiffs in a Title VII case bear the burden of persuasion and in order to obtain injunctive relief must show: (1) a reasonable likelihood of success on the merits; (2) that denial of the injunction will likely result in irreparable harm to the movant; (3) the threatened harm to the movant outweighs the possible harm to the defendant; and (4) that granting the injunction will not be adverse to the public interest. E.g., Cox v. City of Chicago, 868 F.2d 217, 219 (7th Cir. 1989).

If the plaintiffs are able to make out a *prima facie* case of retaliatory discharge

under Title VII, injunctive relief should be granted. Ross v. Double Diamond, Inc., 672 F. Supp. 261, 277 (N.D. Tex. 1987). The only apparent exceptions to this rule are where:

> [T]here is no reasonable expectation that the discriminatory conduct will recur, United States v. W.T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed.2d 1303, or if interim events have "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

Ross, 672 F. Supp. at 277. Having made out a *prima facie* case, the movant effectively shifts the burden to the defendant to show why injunctive relief should not be granted. The very purpose of an injunction is to provide a prompt remedy.

Other courts have also recognized that injunctive relief is appropriate once a movant has established a *prima facie* violation of Title VII. Double Diamond,

672 F.Supp. 276. Having established the *prima facie* case for a Title VII retaliatory discharge, the burden effectively shifts to the defendant to show why injunctive relief should no be granted. The defendant may rebut the *prima facie* case by showing that its actions were taken because of a non-discriminatory, non-pretextual reason. Id., at 276.

In order to make out a *prima facie* case for retaliatory discharge, a plaintiff must show: (1) that he engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Id. at 274 (citing Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) and Jones v. Flagship Int'l, 793 F.2d 714, 724-26 (5th Cir. 1986)). The retaliatory discharge section, 42 U.S.C., Section

2000e-3, clearly prohibits discrimination against an employee who has opposed unlawful employment practices and has taken advantage of the remedies afforded in the Act. Implicit in the provision is that a non-filing individual who may be a witness before the Commission is also protected under the Act.

Assuming that the factual predicates for a *prima facie* showing of a Title VII violation are present, the District Court's dismissal of the Motion for Preliminary Injunction was an abuse of discretion under the current applicable law. Case law indicates that the traditional requirements for injunctive relief, while still relevant, are easier satisfied under Tile VII.

The fact that the rights involved are of a constitutional nature rather than monetary nature meets the requirements of irreparable harm and lack of an adequate

remedy at law. Once a *prima facie* case has been established, the Act's equitable remedies are available and should be granted regardless of whether or not monetary damages are available. The concepts of irreparable harm and lack of an adequate remedy at law are closely intertwined and in some cases may be indistinguishable. Lewis v. S.S. Baune, 543 F.2d 1115, 1123-24 (5th Cir. 1976. Although theoretically separate, a finding that the movant will suffer irreparable harm may in itself be sufficient to show that the movant has no adequate remedy at law. *Id.* This is an inescapable conclusion, for if a movant cannot be compensated for the wrong he has suffered there is by definition no adequate remedy at law. If an adequate remedy does exist, the movant can suffer no irreparable injury. Thus, although the elements are closely related the most important showing

must be that irreparable injury will occur absent issuance of injunction. Id. at 1121.

The Fifth Circuit has held that where there has been discrimination in employment in violation of Title VII, irreparable injury to the employee should be presumed from the fact of the violation. Middleton-Keirn v. Stone, 655 F.2d 609, 611 (5th Cir. Unit B 1981); Mitchell v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). Failure of the district court to issue preliminary relief is inconsistent with the Court's holdings and the objectives and purposes of Title VII, allowing a reversal of abuse of discretion. Id. at 1044-45.

Defendant dismisses the above stated principles with a footnote. Defendant's Memorandum in Support of Defendant's Motion to Dismiss, (R.42). Defendant instead launches into a lengthy discussion of the fact that deprivation of mere money or

property are not sufficient to merit injunctive relief. In so doing, Defendant ignores the fact that what is at issue here is the plaintiffs' right to live free from harassment and retaliation in the course of their employment. As indicated in Hayes, this right is superior to a mere monetary interest. Deprivation of this right constitutes irreparable harm, entitling the movant to immediate injunctive relief. Defendants ignore the real issue and instead focuses on an irrelevant point of law.

The third element for the application for injunctive relief has also been satisfied. This element requires the threatened harm to the movant to outweigh the possible harm to the defendant. If a *prima facie* case of discrimination or retaliation has been shown, it is difficult to see how the balance could tip in favor of the defendants. Defendants will suffer

no great financial difficulty or decline in morale as a result of an order enjoining the offensive behavior. By contrast, if injunctive relief is not granted, plaintiffs will suffer irreparable harm due the continued harassment and retaliation of defendants.

Similarly, the public has an interest in eradicating oppressive and discriminatory employment practices. These practices have a negative effect not only on the affected workers, but on the labor force of the country as a whole. Hayes, 415 F.2d at 1045. The public interest will be served by granting the injunction, and disserved by denying it.

VI. Conclusion

Petitioners submit that a Title VII Plaintiff need not wait until the EEOC has completed the administrative process before Plaintiff can obtain injunctive protection against retaliation in the federal courts. Assuming that the factual predicates for a *prima facie* showing of a Title VII violation are present, the District Court's dismissal of the motion for preliminary injunction was an abuse of discretion. Case law indicates that the traditional requirements for injunctive relief, while still relevant, are easier satisfied under Title VII.

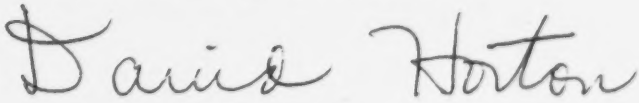
The Fifth Circuit has held that in Title VII cases, the court is to presume that the employee has suffered irreparable injury from the fact of the violation. Also, the fact that the rights involved are of a constitutional rather than monetary nature meets the requirements of

irreparable harm and lack of an adequate remedy at law.

Once a *prima facie* case has been established, the Act's equitable remedies are available and should be granted regardless of whether or not monetary damages might be available. The decision to award injunctive relief in such cases is not within the discretion of the District Court, and relief should be awarded automatically absent proof that conditions have so changed that it is no longer necessary.

Therefore, the District Court erred in granting Respondent's Motion to Dismiss and dismissing Petitioners' Complaint for lack of subject matter jurisdiction. The District Court also erred in not granting Petitioners' request for injunctive relief.

Respectfully submitted,



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for Preliminary Injunction and Defendant's Motion to Dismiss or Summary Judgment. After a review of the entire file, it is this Court's opinion that Plaintiffs have not exhausted their administrative remedies and therefore this Court is without jurisdiction to rule on their complaints. "It is well settled that the provisions of Title VII of the Civil Rights Act applicable to claims of racial discrimination in federal employment are the exclusive and pre-emptive remedy for such claims." Hampton v. Internal Revenue Service, 913 F.2d 180, 183 (5th Cir. 1990), citing Brown v. General Serv. Admin., 425 U.S. 820, 829, 96 S.Ct. 1961, 1966 (1976).

We are unable to examine the merits of Plaintiff's EEO Complaint and in fact Higareda has stated he does not want this Court to consider the merits of his pending EEO charges by the statement in his complaint:

> "This complaint does not raise the merits of any pending administrative complaint. This complaint is filed for limited purposes of protecting Plaintiff's well-being and rights under the Act; and to protect and preserve the Commission's jurisdiction in these matters" Plaintiff's Complaint p. 2.

An employment discrimination claimant who chooses to pursue administrative review of federal agency's denial of his claim is required to exhaust that remedy before filing civil action in federal court. See Tolbert v. U.S., 916 F.2d 245 (5th Cir. 1990). Such exhaustion occurs if there is a final agency decision at which time Plaintiff has ninety (90) days to file a suit or secondly, if more than 180 days have elapsed since the filing of his formal EEO complaint without a final decision. 42 U.S.C. §2000e-16(c) (1992). Plaintiff Higareda's complaint sets forth no final agency decision upon which this Court can base its jurisdiction. However, it does

appear that an administrative action (the agency's review of decision pursuant to EEOC order to remand) has been pending for the requisite 180 days. Evidently Higareda does not wish this Court to address the merits of that claim. (see supra)

Plaintiff Trevino has not provided the Court with any evidence that he ever filed an EEO complaint concerning his removal. Alternatively, Defendant's Exhibit 2, signed and dated May 10, 1991, (after this complaint was filed) appears to be a settlement agreement that reinstates Trevino. It appears that the settlement agreement granted Trevino's requested relief.

The only proper defendant in Title VII claims is the agency head. Higareda's attempt to join his pendent state law claim against the individual defendants is not proper and was held improper in Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404 (1983)

(barring recovery against federal employer's supervisor for defamation). In Hampton the 5th Circuit held that "Hampton cannot circumvent the administrative-exhaustion requirement by suing his supervisor individually in tort." Citing Bush at 390.

Plaintiff also requests relief to be granted under the Federal Torts Claim Act. This Court is unable to grant such relief, however, for virtually the same reasons as set out above. Plaintiff has failed to exhaust his administrative remedies as required by 28 U.S.C. §2675(a).

For the aforementioned reasons, this Court lacks jurisdiction pursuant to Rule 12 (b)(2) F.R.C.P. and is unable to grant the Plaintiff's requested relief. Plaintiff's Motion for Preliminary Injunction shall be DENIED and Defendant's Motion for Dismissal shall be GRANTED as to all the Defendants without prejudice to

Plaintiff. Because this Court lacks jurisdiction, it is not necessary to address Defendant's allegations regarding insufficiency of service of process or insufficient criteria for injunctive relief.

IT IS SO ORDERED.

Done this [17th] day of November, 1992 in Brownsville, Texas.

/s/
Filemon B. Vela
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7049
Summary Calendar

AUDIEL HIGAREDA and GERARDO TREVIÑO,
Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Defendants-Appellees.

Appeal from the United States
District Court
for the Southern District of Texas
(CA-B90-221)

Before DAVIS, JONES and DUHÉ, Circuit Judges:*

PER CURIAM:

In this Title VII-related case, appellants Higareda and Trevino only

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, has determined that this opinion should not be published.

the district court's denial of injunctive relief. They sought an injunction as a remedy for the postal service's alleged retaliation against them for having filed or asserted Title VII discrimination claims. Finding no error, we affirm.

The claims of Higareda and Trevino are not related. Postal service employee Higareda filed an EEOC complaint on September 7, 1990, alleging that he was retaliated against at a softball game over the Memorial Day weekend of that year. Although the game was not officially sponsored by the post office, his post office supervisor allegedly shut down his T-Shirt concession and harassed him. Trevino was fired by the post office on February 1, 1991. He appealed to the Merit Systems Protection Board that this termination was in retaliation for his earlier EEO complaints. Trevino settled the termination dispute with the post

office by entering a "last chance settlement" in May, 1991. Under the settlement, he remained a post office employee and dismissed the appeal. No EEO retaliation charge seems to have been filed.

Contrary to appellants' assertions, it is well settled that federal courts have no jurisdiction over federal employees' Title VII claims--including those for retaliation--until administrative remedies have been exhausted. Porter v. Adams, 639 F.2d 273, 276 (5th Cir. 1981), cited in Hampton v. IRS, 913 F.2d 180, 182 (5th Cir. 1990). This principle includes claims for injunctive relief based on alleged retaliation, inasmuch as a court has no authority to grant an injunction without some independent basis of federal jurisdiction. In Trevino's case, administrative remedies have not been exhausted, and the court properly concluded

that it lacked jurisdiction. There is no evidence that Trevino filed a Title VII retaliation claim at all over his firing. And, although he did allege retaliation in his appeal of termination to the Merit Systems Protection Board, that appeal was resolved in his favor by a consent and settlement, and MSPB retained jurisdiction. Thus, there was no adverse decision from which Trevino could appeal, much less seek injunctive relief.

Higareda's situation is somewhat different. Because 180 days elapsed after the filing of his EEO complaint, he exhausted his administrative remedies during the pendency of his case in federal court and became entitled to file suit. That fact does not, however, require remand or reconsideration of the denial of injunctive relief. Higareda's request for injunctive relief failed to specify the ongoing injuries he is suffering, the

nature of the defendants' activities sought to be enjoined, why injunction would be a superior remedy to relief at law, and what kind of injunctive relief was sought. The complaint was unverified. Further, Higareda dallied for months before obtaining proper service of process and never responded to the postal service's motion to dismiss or for injunctive relief. During all the months that the case was pending in the district court, Higareda could have cured any and all of these deficiencies. He did not do so. As an equitable matter, injunctive relief is simply not appropriate.

For these reasons, the judgment of the district court is AFFIRMED.

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v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying preliminary injunctive relief to Title VII claimants.

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UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is unpublished, but the decision is noted at 5 F.3d 1495 (Table). The district court opinion (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1993. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 28, 1990, petitioner Audiel Higareda filed an internal charge of employment discrimination alleging that his employer, respondent United States Postal Service, retaliated against him and discriminated against him based on "color as related to ethnicity." Compl., Exh. C, at 1. The Postal Service dismissed the complaint initially. Higareda then appealed to the Equal Employment Opportunity Commission (EEOC), and the matter was remanded to the Postal Service. *Id.* Exh. A.

While the administrative proceeding was still pending, Higareda filed a district court complaint against the Postal Service and certain individuals on December 10, 1990. The complaint alleged employment discrimination based on retaliation in violation of Title VII, but stated that the suit was "subject to the completion of administrative conditions precedent." Compl. ¶ 1, at 1. The complaint explained that "[t]he relevant administrative proceedings are still pending," that "[t]his Complaint does not raise the merits of any pending administrative complaint," and that the complaint was "filed for limited purposes of protecting [Higareda's] well-being and rights under the Act; and, to protect and preserve the [EEOC's] jurisdiction in these matters." *Id.* at 1-2. In the complaint, Higareda sought a preliminary injunction "ordering [respondents] to cease and desist in their pattern and practice and retaliation, abuse and harassment in violation of the Act's prohibitions against such retaliation." *Id.* ¶ 21, at 10. The complaint referred to a separately filed motion for preliminary injunction which contained no substantive argument,

but rather consisted of a cursory two-page statement that relied only on the allegations in the complaint as support for issuance of the injunction. See Pltf.'s Mot. for Prelim. Inj. (Feb. 13, 1991).

On April 25, 1991, an amended complaint was filed in Higareda's action, adding petitioner Gerardo Treviño as a plaintiff and adding allegations that the Postal Service had engaged in employment discrimination when it terminated Treviño on February 1, 1991, in retaliation for Treviño's having filed a Title VII Equal Employment Opportunity (EEO) charge. Pet. 2; Am. Compl. ¶ 21, at 9-10. Treviño's factual allegations were unrelated to petitioner Higareda's factual allegations. Procedurally, Treviño alleged that he had filed an appeal with the Merit Systems Protection Board (MSPB) and that the matter was still pending. Am. Compl. ¶ 26, at 11. The amended complaint added a prayer for relief that respondent be ordered to reinstate Treviño. On May 10, 1991, petitioner Treviño settled his termination dispute with the post office. Treviño dismissed his MSPB appeal and the post office restored Treviño as an employee. Pet. App. A4, A9.

On June 25, 1991, respondent moved to dismiss the amended complaint or for summary judgment and opposed petitioners' motion for preliminary injunction. Respondent contended that petitioners failed to state a claim upon which relief could be granted because they had failed to exhaust administrative remedies. This contention was based on the allegations that 180 days had not elapsed between the filing of the EEO complaint and the filing of petitioners' claims in federal court, and that petitioners had not received a final decision from the adminis-

trative proceedings prior to filing suit. Mem. in Supp. of Def.'s Mot. 4-6 (June, 25, 1991). Respondent also argued (1) that to the extent any claims by Higareda had been pending in the administrative proceeding for more than 180 days, Higareda had explicitly precluded federal court consideration of the merits of those EEO charges through his pleadings, and (2) that the only claim that was not then pending in the administrative proceeding had never been submitted by Higareda to the EEO process. *Id.* at 5-6.* As for Treviño, respondent pointed out that he did not even claim to have filed an EEO complaint concerning his termination (*id.* at 6), and that the court had no jurisdiction over the claim he settled with the MSPB. *Id.* at 6-7. Respondent contended that petitioners had failed to state a cause of action under the Federal Torts Claims Act (FTCA) or against individual defendants. *Id.* at 7-9. Respondent also argued that the complaint should be dismissed under Fed. R. Civ. P. 4 due to insufficient service of process. *Id.* at 9-13. Finally, respondent contended that petitioners did not carry their burden for obtaining a preliminary injunction by, for example, failing to demonstrate irreparable harm and failing to specify adequately what action they sought to have enjoined. *Id.* at 14-18.

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* Respondent suggested that "Higareda's otherwise inexplicable pleadings can be explained by EEOC regulation 29 C.F.R. § 1613.283, which mandates termination of the EEO administrative process when a civil suit is filed on the same matter. Here Higareda seems to be engaged in an attempt to obtain relief from this Court without having his EEO complaint dismissed pursuant to the above-cited regulation." June 25, 1991, Mem. 5 n.2.

On November 17, 1992, the district court denied petitioners' motion for preliminary injunction and granted respondents' motion to dismiss. Pet. App. A1-A6. The court reasoned that it lacked jurisdiction to examine the merits of the complaint because petitioners had not exhausted their administrative remedies. *Id.* at A2. The court noted that it appeared that some of Higareda's claims had been pending in the administrative proceeding for more than the 180 days required for exhaustion, but that in his complaint Higareda expressly stated that he did not wish the court to review the merits of those claims at that time. *Id.* at A2-A4. The court also relied on the fact that Treviño had not provided it with any evidence that he ever filed an EEO complaint concerning his termination and on the fact that Treviño had obtained his requested relief through his settlement. *Id.* at A4. The court agreed with respondent that the individual defendants were not proper parties and that the FTCA claims were barred for lack of exhaustion of remedies. *Id.* at A4-A5. The court concluded that, because it lacked jurisdiction, it did not need to reach the service of process issue or the question whether petitioners had met the criteria for injunctive relief. *Id.* at A6.

2. Petitioners appealed the district court's denial of injunctive relief. Pet. App. A7-A8. The court of appeals affirmed. It stated that under *Porter* v. *Adams*, 639 F.2d 273, 276 (5th Cir. 1981), and *Hampton* v. *IRS*, 913 F.2d 180, 182 (5th Cir. 1990), federal courts do not have jurisdiction over federal employees' Title VII claims, including retaliation claims, until administrative remedies have been exhausted. Pet. App. A9. The court stated that claims for

injunctive relief are also jurisdictionally barred under this principle until after administrative remedies have been exhausted. *Ibid.*

In addition, the court held that the district court did not have jurisdiction of Treviño's case because Treviño's appeal to the MSPB had been resolved in his favor by the settlement, MSPB had retained jurisdiction, and therefore "there was no adverse decision from which Treviño could appeal, much less seek injunctive relief." Pet. App. A10. The court of appeals then found that, although Higareda had exhausted his administrative remedies during the pendency of the suit, his request for injunctive relief "failed to specify the ongoing injuries he is suffering, the nature of the defendants' activities sought to be enjoined, why injunction would be a superior remedy to relief at law, and what kind of injunctive relief was sought." *Id.* at A10-A11. The court of appeals pointed out that the denial of injunctive relief was further supported as an equitable matter due to Higareda's failure to verify the complaint, his delay in effecting proper service, and his failure to respond to either the motion to dismiss or the opposition to his request for injunctive relief. *Id.* at A11.

ARGUMENT

1. Petitioners contend (Pet. 7, 17) that the district court and the court of appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII, a claimant "must complete the same conditions precedent relevant to asserting substantive claims under the Act."

To the extent the court of appeals believed that a federal court lacks jurisdiction to grant injunctive

relief to a federal claimant alleging retaliation prior to exhaustion of administrative remedies, it appears to be wrong. See *Wagner* v. *Taylor*, 836 F.2d 566, 570-575 (D.C. Cir. 1987) (in Title VII retaliation case by federal employee, although federal court does not have jurisdiction to issue permanent injunction that would circumvent administrative procedures, it does retain equitable authority temporarily to enjoin retaliation and other acts of reprisal during the pendency of the administrative and judicial review process); *Aronberg* v. *Walters*, 755 F.2d 1114 (4th Cir. 1985); see also *Sheehan* v. *Purolator Courier Corp.*, 676 F.2d 877 (2d Cir. 1981) (in Title VII retaliation case by private employee, federal court has jurisdiction to entertain motion for preliminary injunctive relief against employer retaliation while charge is pending in administrative proceeding). The court of appeals' statement in this regard was, however, not relevant to its decision of the case. In regard to both petitioners, the court articulated other correct bases for denying injunctive relief.

The court of appeals correctly affirmed the district court's conclusion that the merits of petitioner Treviño's claim were not properly before it because he had not obtained an adverse ruling from the MSPB, the MSPB had retained jurisdiction after the settlement, and he had obtained the relief he sought through his settlement. As for Higareda, the court of appeals correctly ruled that it did not have jurisdiction over the merits of Higareda's retaliation claims because Higareda expressly did not submit those claims to the district court. The court of appeals also found that although it appeared that Higareda had exhausted his administrative remedies

during the pendency of the case, his request for injunctive relief was nonetheless properly denied because he failed to specify the ongoing injuries he was suffering or the nature of the actions he sought to be enjoined. Other equitable considerations also militated against an injunction. The court of appeals correctly decided these fact-bound questions. They do not, in any event, warrant this Court's review.

2. Petitioners also contend (Pet. 7-11) that the criteria for preliminary injunctive relief were met in this case because a Title VII plaintiff who has established a prima facie case of retaliation is "generally entitled to injunctive relief unless it can be shown that there is no reasonable expectation that discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated" (Pet. 7), and because the burden in such cases shifts to the defendant to demonstrate that injunctive relief should not be granted.

Petitioners' argument assumes a Title VII plaintiff who has established a prima facie case of retaliation. Petitioners, however, did not make such a showing below. Moreover, in order to be entitled to injunctive relief from the courts below, petitioners had to establish (1) a substantial likelihood of succeeding on the merits of the case; (2) that they would suffer irreparable harm if the injunction was not granted; (3) that the threatened injury to them outweighed any damage to the other parties; and (4) that the injunction, if issued, would not be against the public interest. *Texas* v. *Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975).

The standard of review for a preliminary injunction is whether the district court abused its discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *United States* v. *Corrick*, 298 U.S. 435, 437-438 (1936). The district court clearly did not abuse its discretion here where petitioners did not even attempt to meet the applicable legal standard for the issuance of preliminary injunctive relief, but rather filed a cursory two-page motion relying on the unverified complaint as the only factual support for their motion. See Feb. 13, 1991, Mot. Petitioners apparently also did not respond to respondent's opposition to the motion or oppose respondent's motion to dismiss. Pet. App. A11. Finally, as the court of appeals found, petitioners did not describe in any detail the acts sought to be restrained beyond the broad, unverified allegations of their complaints, and in effect simply submitted a request for a general admonishment which cannot support an order for injunctive relief under Fed. R. Civ. P. 65(d). See *Seattle-First National Bank* v. *Manges*, 900 F.2d 795, 800 (5th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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